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SOME OBSERVATIONS ON THE CASE OF PRIVATE WADSWORTH.

In the February number of this magazine¹ I tried to state my conclusions relative to the meaning of the phrase "martial law" as at present used; and as to the possibility of its existence in Pennsylvania during the recent strike of the anthracite coal miners. Briefly, those conclusions were these: that the civil is a higher law than the military; that no exception to this proposition is allowed save in time and place of actual war, when, of necessity, there is no machinery for the enforcement of the civil law; that these propositions hold true of England, of the United States, and of the state of Pennsylvania; that, hence, as admittedly the situation in the coal regions did not amount to war, the civil law must take cognizance of all violence committed there, whether by civilian or soldier; and that, therefore, Private Wadsworth must answer for his act before a civil tribunal, according to the known law of the land.

Even though I be wrong in my conclusion, however, as to the non-existence of martial law, it seems that the parties concerned in the killing of the victim must stand civil trial, after the exigency has passed. This is conceded by those who argue most strongly for the existence of martial law.

Thus Birkheimer, who is a strenuous adherent of the theory that martial law may occur, says: "If it be asked what security exists against abuse of this summary military authority, the answer, as before pointed out, is in the amenability of those exercising it not only to military superiors, but also before the civil tribunals of the country when peace and order again resume their sway."² And again, "Yet the assertion that the power exercised under martial law is entirely arbitrary is liable to mislead. It cannot be meant by this that the authority there exercised by the military is despotic and irresponsible, nor even that responsibility is limited to accountability to military superiors alone. And

¹ AMERICAN LAW REGISTER, O. S. Vol. 51, p. 63.

² Birkheimer, "Military Government and Martial Law," 300.

herein lies the safety of the community.”³ And finally: “The safeguards against martial law are not found in the denial of its protection, but in the amenability of the President to impeachment; of military officers to the civil and criminal laws and to military law; in the frequent change of public officers, the dependence of the army upon the pleasure of Congress, and the good sense of the troops.”⁴

Finlason, the exponent par excellence of the doctrines of martial law seems to say that civil or criminal proceedings may be brought against a soldier for (1) cases of utter illegality, through total want of jurisdiction or authority; (2) cases of acts done during martial law, but not really under and by virtue of it, that is, not really in pursuance of it, but under color of it, for private malice and revenge; and (3) cases of acts done without orders or authority at all. But he contends that no commander, officer or soldier “lawfully putting martial law in force under legal declaration of it, can be legally liable for *orders* issued or obeyed under and by virtue of military authority.”⁵ For this proposition he cites *Johnstone v. Sutton*.⁶ This case, as a glance at the report will show, has nothing to do with martial law, but with the power of a civil court to revise the finding of a court-martial sitting to try a military offence.

Moreover, the distinction attempted in the paragraph above-quoted from Finlason does not seem valid. After the three-fold classification of cases wherein a civil court may try a soldier, there seems very little left which the civil court cannot investigate. Again, the writer’s assumption is rather startling when he begins to talk of “lawfully putting martial law in force,” and a “legal declaration of it.” One would suppose that the lawfulness of it was the subject under discussion, and if its legality is thus to be tacitly assumed there is nothing further to discuss.

It being settled, then, that the soldier’s guilt or innocence must depend on the action of a criminal court, constituted and acting under the constitution and the rules of the com-

³ *Ibid.*, 304.

⁴ *Ibid.*, 306.

⁵ Finlason, “A Treatise on Martial Law,” 72, note (a).

⁶ 1 T. R. 528.

mon law, we may undertake the discussion of some of the considerations which must weigh with such court in reaching a just conclusion.

The result, so far as the criminality or innocence of the defendant's act goes, must depend, it seems, upon the answers to be given two questions: (1) Were the orders, under which he acted, lawful orders? If so, then the case is ended, and the defendant must be acquitted. But if not, then: (2) Was the illegality of the orders patent to the defendant, or of such a nature that it should have been patent to one of his abilities and station, under the circumstances of the case? Let us proceed to a consideration of these two inquiries.

I. THE LEGALITY OF THE ORDERS.

If the conclusions reached in my former article are correct, then the military in the coal regions were a sort of *posse comitatus*,—with this added, that they were organized and officered and subordinated to a certain discipline. They had, as regards the suppression of riot, or the prevention of a breach of the peace, or of a felony, no higher privileges than the constabulary. They had the right to meet force with force, to arrest a felon and if he were escaping to shoot him to prevent his escape; they had the right, as has any peace officer to take life to prevent the commission of a felony. But in all these respects they were peace officers merely. If either officer or private overstepped the line of what was strictly necessary to these ends, he was guilty of a wrongful act. No middle ground is possible,—either there was peace in the coal regions, in which case these men were peace officers and amenable to the rules and sanctions of the criminal code; or there was war in those regions, in which case the soldier is answerable to no tribunal save by the will of his commander, under the laws of army discipline.

If the civil law was paramount, does it seem that the governor of the state, who is charged with the execution of its behests, took the lawful and appropriate method to enforce it when he wrote this order for the guidance of the general commanding: "He . . . will arrest all persons engag-

ing in acts of violence and intimidation, *and hold them under guard until their release will not endanger the public peace.*"⁷ Surely no sheriff could lawfully give such an order to his deputies. Is this an indirect attempt, tacitly to suspend the writ of *habeas corpus*? If carried out, this order would certainly place a large part of the government of the community at the whim of the commanding officer. It seems that there was no necessity for the arbitrary holding of prisoners by the military. No reason is apparent, why they should not be turned over to the civil arm for trial and punishment. It may be asked, what corrective is there for such an illegal order? The answer is,—impeachment.

Consider, then, the order issued by the general in command, in pursuance of the governor's instructions.⁸ The orders are to guard a house that has recently been dynamited. This is reasonable enough. But see what follows. "If any attempt is made to dynamite them, or they are shot at or stoned, *or any suspicious characters prowl around,*"⁹ particularly in the rear of the house, who fail to halt when directed by the guard, the guard shall shoot and shoot to kill."

It is submitted that these do not read like the orders of a peace officer to his subordinates in a country governed by common law. No ordinary peace officer would have the right to shoot "if he saw suspicious characters prowling around." Add to this the fact that the man shot was in the highway, and that no public warning seems to have been given or proclamation to have been made that pedestrians should not use the highway at this point, or that persons visiting the house where the shooting occurred should halt when called upon to do so.

Can it be contended that such orders were lawful? If so, orders that every man in the region should keep indoors under pain of death would have been equally lawful. This is not civil government, but a dictatorship. Surely an

⁷ Italics mine. For the orders in full, see 51 AM. L. REG., O. S. 64 (February, 1903).

⁸ The order will be found, 51 AM. L. REG., O. S. 65.

⁹ Italics mine.

experienced officer should know that he oversteps his authority when he gives such an order. There is no reason why he should not be made to answer before the law for such abuse of authority.¹⁰

Turning now to the case of the private who did the shooting,—if he were put upon trial for the act, what would be the duty of the court in its instructions to the jury? Clearly to say to the jury that the orders were illegal. If the orders to the soldier were to take the life of one engaged in committing a felony; or to save the soldier's own life or those of others; this would be justifiable by the well-known rules of the common law. So, also, of shooting to prevent an escape. If a riot were actually in progress, life could only be taken to prevent its spread and the consequent loss of life, and in such case the jury must be the judges of the necessity of the order, but if there was no open riot in progress, and no felony being committed and no attempted escape of a felon, and no imperious necessity of self-defence, then an order to kill was an unwarranted and illegal order.

II. CAN DEFENDANT JUSTIFY BY ILLEGAL ORDERS OF HIS SUPERIOR?

Granting then that the orders were illegal, may they nevertheless operate to shield defendant from civil or criminal liability?

A great number of cases has answered this question. It is conceived that cases where an officer or soldier has been held civilly liable in spite of a plea of superior's orders are quite as much in point as those holding him criminally liable. If a man cannot plead such orders as a justification for an alleged civil wrong, much less ought he be allowed to do so where he is indicted for criminal misconduct.

The English cases in point are few. Lord Mansfield mentions a case of one Gambier,¹¹ a captain in the British navy, who, by order of Admiral Boscawen, pulled down the houses of some sutlers on the coast of Nova Scotia, who were supplying the sailors with liquors, to the

¹⁰ See *Hyde v. Melvin*, 11 Johns. 521, at p. 523; *McCall v. McDowell*, 1 Abbott, 212.

¹¹ *Mostyn v. Fabrigas*, Cowp. 180.

injury of the sailors' health. The order was held unlawful and the captain was held liable in damages to the sutlers.¹²

The earliest American case known to the writer where an inferior has been held liable civilly in spite of the orders of a superior is *Little v. Barreme*,¹³ decided by the Supreme Court of the United States in 1804. Here it appeared that an act of Congress had authorized the seizure of all American vessels sailing to French ports, and empowered the President to order the commanders of American naval vessels to seize and search any vessel suspected of such destination. The President ordered the seizure of vessels sailing *from* as well as *to* French ports, transmitting to the captains with the orders a copy of the act; and under such orders the defendant, a captain of an American vessel, seized the "Flying Fish," a Danish vessel, which was bound *from* a French port. The District Court of the United States ordered restoration of the vessel but refused damages to the owner because it thought there was reasonable cause to believe the vessel to be American. This judgment the Circuit Court reversed, on the ground that, even if an American vessel, its seizure would have been illegal as it was proceeding *from* a French port, not *to* one, as provided in the act of Congress. Heavy damages were awarded the owners against the captain defendant. Chief Justice Marshall delivered the opinion.¹⁴ It will be observed that here no

¹² See, accord, *Tobin v. Queen*, 16 C. B. N. S. 310.

¹³ 2 Cranch, 170.

¹⁴ In the course of his opinion he said: "I confess the first bias of my mind was very strong in favor of the opinion that, though the instructions of the executive could not give a right, they might yet excuse from damages. I was much inclined to think that a distinction ought to be taken between acts of civil and those of military officers; and between proceedings within the body of the country and those on the high seas. That implicit obedience which military men usually pay to the orders of their superiors, which indeed, is indispensably necessary to every military system, appeared to me strongly to imply the principle that those orders, if not to perform a prohibited act, ought to justify the person whose general duty it is to obey them, and who is placed by the laws of his country in a situation which, in general, requires that he should obey them. I was strongly inclined to think that where, in consequence of orders from the legitimate authority, a vessel is seized with pure intention, the claim of the injured party for

question was made of the *bona fides* of the captain, nor was the question discussed whether defendant should have known that the order was illegal. In *Hyde v. Melvin*,¹⁵ the defendant who was sued in debt for a penalty under a statute of New York which provided that "no officer shall call out or cause to appear" any of the militia within a certain time prior to any election, defended on the ground, *inter alia*, that he did not know of the statute and that he acted under the orders of his colonel. The court, while deciding on other grounds, remarked that this constituted no excuse, but would only make the colonel equally culpable with the defendant. In *Mitchell v. Harmony*¹⁶ the doctrine of *Little v. Barreme* was affirmed.

*Despan v. Olney*¹⁷ decided in the first circuit by Justice Curtis in 1852, seems to mark the first narrowing of the theory of unconditional liability. There it appeared that during the Dorr rebellion in Rhode Island, the defendant came from New York and volunteered for the state militia. He was given a commission as captain and ordered to Pawtucket. General Anthony ordered him to arrest the plaintiff, who had been a supporter of the rebellion, but had laid down his arms and was at the time supporting the regular government. The plaintiff sued the defendant for unlawful arrest and he defended on the ground that he was obeying a lawful order. The court charged the jury to this effect: (1) Martial law existed in Rhode Island at the time of the commission of the defendant's act.¹⁸ (2) But martial

damages would be against the government from which the orders proceeded, and would be a proper subject for negotiation. But I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my brethren, which is, that the instructions cannot change the nature of the transaction, or legalize an act which, without those instructions, would have been a plain trespass."

¹⁵ 11 Johns. 521, 1814.

¹⁶ 13 How. 115, 1851.

¹⁷ 1 Curtis, 306.

¹⁸ This statement was based by Justice Curtis on what he conceived the Supreme Court of the United States had said in *Luther v. Borden*, 7 How. 1. He attributed to the court the doctrine that a state legislature might declare martial law. A reading of the opinion in that case will show that the majority expressly refused to commit itself on this point and that the dissenting judge flatly denied the proposition.

law is not an absolute defence; its existence only aids the jury in discovering the intent of the defendant. (3) If he was guilty of malice, then he is liable. (4) If there was no malice, then he was justified in following the order, *which was apparently within the scope* of his superior's authority.

It will be noted that this charge lays down a new rule as to liability for obedience to orders, to wit: that the act is justifiable if the orders were within the apparent scope of the officer's authority and there was no malice in its commission. As this was merely a charge to a jury, no authorities are cited.

During the War of the Rebellion certain prisoners were in the custody of an officer of the Supreme Court of Texas, pending the hearing of a writ of *habeas corpus*, for which they had applied, to determine whether they should be tried by that court or remanded to the military. Sparks, a major of the Confederate Army took them from the custody of said officer. The court was asked to issue an attachment for Sparks. His answer was that he had seized the prisoners at the orders of the general commanding. The court held that the prisoners were in the custody of the court and no authority of any sort existed to take them from such control, and that the orders did not justify Sparks, and an attachment should issue.¹⁹ The distinction drawn in *Despan v. Olney* between orders within or without the apparent scope of the superior's authority was not mentioned.²⁰

¹⁹ *State v. Sparks*, 27 Tex. 627.

²⁰ The court said: "Military officers are bound to obey all legal orders of those by whom they are commanded. But there is nothing better settled, as well by the military as the civil law, than that neither officers nor soldiers are bound to obey any illegal order of their superior officers; but, on the contrary, it is their bounden duty to disobey them. The soldier is still a citizen and as such is always amenable to the civil authorities." This language is, however, much weakened by what follows: "If, however, he was in truth, acting, as he claims, in obedience to the orders of the major-general of this military district, it certainly would go far to excuse him. While an officer must not obey an unlawful order of his superior in command, yet, as in all cases where he declines obedience to it he acts at his peril, much indulgence should be shown in extenuation of his obedience to such orders from those he is

In *Weatherspoon v. Woody*²¹ it was said that a subordinate can only justify under his superior's orders when the circumstances amount to duress.

About this time two very important cases were decided. The first, *Tramwell v. Bassett*,²² was an action of trespass against five soldiers for carrying away plaintiff's goods. The plea was that defendants were duly enrolled in a company in the Confederate army, and that their captain ordered the seizure. The plaintiff demurred. A judgment for the plaintiff thereon was reversed. The court took the view that the orders were a complete justification, quoting Vattel to the effect that the soldier's only duty is obedience. This case stands alone in this extreme position.

The second case attempts, like *Despan v. Olney*,²³ while holding to the general view that a soldier is liable for obeying illegal orders, to qualify the rule. The qualification comes close to a negation of the existence of the rule. In this case, *McCall v. McDowell*,²⁴ it appeared that at the time of President Lincoln's assassination, General McDowell, the military commander of the district of California, issued orders for the arrest of any one publicly voicing sentiments of exultation over the president's death. Douglas, a captain, acting under these orders, arrested the plaintiff for expressing such sentiments. Plaintiff was confined for some days in military prison. On his release, he brought an action for damages against McDowell and Douglas. The court held the order illegal, and, the case being tried without a jury, found against McDowell in compensatory damages, refusing punitive damages because no malice was shown, and because plaintiff had given great provocation.

The court further held that Douglas was not liable at all, as he acted under orders. I shall quote from the opinion

ordinarily bound to obey. Especially should this be so, when the order comes to him from such high authority as that from which the one now in question is claimed to emanate."

²¹ 5 Cold. (Tenn.) 149, 1867.

²² 24 Ark. 499, 1866; see also, *dictum* to same effect: *Taylor v. Jenkins*, 24 Ark. 337.

²³ *Supra*.

²⁴ 1 Abb. C. C. 212, 1867.

in the note.²⁵ A glance at the language quoted in the note will show the court's position. The opinion continues to the effect that there is no need to give a plaintiff double redress, and therefore it is sufficient to limit plaintiff's action to the one really responsible, that is, the officer who gave the orders.²⁶ It is recognized that this is not the rule in civil law, but it is said that the difference between cases arising under the civil law and such as this is that in the former he who gives the command and he who receives it are, in the eye of the law, equal; the subordinate is a free agent; while in military life he who is commanded acts under compulsion. In support of this distinction the court cites the case of a wife committing crime in the presence of her husband where she is excused on the ground of compulsion.²⁷ It will be noticed that this case has many features which limit the apparent breadth of the exception. In the first place it was practically war time and the country was under great stress. If ever it could be lawful arbi-

²⁵ At p. 218: "Except in a plain case of excess of authority, where at first blush it is apparent and palpable to the commonest understanding that the order is illegal, I cannot but think that the law should excuse the military subordinate when acting in obedience to the orders of his commander. Otherwise he is placed in the dangerous dilemma of being liable in damages to third persons for obedience to an order, or to the loss of his commission and disgrace for disobedience thereto." . . . "The first duty of a soldier is obedience, and without this there can be neither discipline nor efficiency in an army. If every subordinate officer and soldier were at liberty to question the legality of the orders of the commander, and obey them or not as he may consider them valid or invalid, the camp would be turned into a debating school, where the precious moment for action would be wasted in wordy conflicts between the advocates of conflicting opinions."

²⁶ At p. 220.

²⁷ At p. 221. The court sums up its views thus: "Between an order plainly legal and one palpably otherwise—particularly in time of war—there is a wide middle ground, where the ultimate legality and propriety of orders depends or may depend upon circumstances and conditions of which it cannot be expected that the inferior is informed or advised. In such cases, justice to the subordinate demands and the necessities and efficiency of the public service require, that the order of the superior should protect the inferior; leaving the responsibility to rest where it properly belongs—upon the officer who gave the command."

trarily to arrest and confine a man for seditious utterances this was the time. Secondly the case was tried without a jury and the judge was therefore deciding the facts which would justify the defendant's belief in the legality of the orders, as well as declaring the law. It is to be noticed also that the court does not cite the earlier decisions of the Supreme Court of the United States, which certainly went no such lengths as does this opinion.

The last civil case to be cited is *Bates v. Clark*,²⁸ decided in the Supreme Court in 1877. An act of Congress gave authority to any military officer who had reason to suspect that liquors had been or were about to be brought into Indian country, in violation of the law, to search for and seize the same. The defendants, a captain and lieutenant, seized some whisky which they thought was being sold within the confines of the Indian country. They were in error, and on discovery of the mistake returned the liquor to its owner. The latter brought trespass against them. Their defences were (1) innocent mistake, and (2) orders from their commander. It was held that the first was no defence, but only excused from punitive damages; and as to the second that superiors' orders could never justify an unlawful act in time of peace. No exception was made of the case of orders apparently within the scope of the officer's authority, nor was the rule qualified as in *McCall v. McDowell*.²⁹

The civil cases, then, with one exception, lay down the rule that a soldier cannot justify an unlawful act by the plea that he committed it under orders. Two cases qualify this rule, the one by saying that if the orders are within the apparent scope of the officer's authority they constitute a justification; the other by saying that unless the order is obviously and palpably illegal it is a justification.

Let us now turn to the criminal cases. The earliest is *Axtell's Case*.³⁰ The memorandum of the case in Kelyng reads: "That upon the tryal of one Axtell, a soldier, who commanded the guards at the King's tryal, and at his mur-

²⁸ 95 U. S. 204.

²⁹ *Supra*.

³⁰ Kelyng, 13.

der, he justified that all he did was as a soldier, by the command of his superior officer, whom he must obey or die. It was resolved that was no excuse, for his superior was a traitor, and all that joyned him in that act were traitors, and did by that approve the treason; and where the command is traitorous, there the obedience to that command is also traitorous."³¹

The first American case is *United States v. Jones*.³² Jones was indicted for feloniously entering a certain Portuguese brig, assaulting the captain and stealing out of said brig certain articles. Defendant was first lieutenant of a privateer commissioned by the president of the United States. It appeared that the captain of the privateer allowed the boarding and rifling of the brig under the impression that she was French. She flew the English colors. It was proved that both vessel and cargo were owned in Portugal and were bound from Lisbon for New York. One ground of defence was that defendant presumably acted under the orders of his superior, the captain. This was held to be no defence. The court said: "No military or civil officer can command an inferior to violate the laws of his country; nor will such command excuse, much less justify the act. Can it be for a moment pretended, that the general of an army, or the commander of a ship of war, can order one of his men to commit murder or felony? Certainly not. . . . Disobedience of an unlawful order, must not, of course, be punishable; and a court-martial would, in such a case, be bound to acquit the person tried upon a charge of disobedience. We do not mean to go further than to say, that the participation of the inferior officer, in an act which he knows, or ought to know, to be illegal, will not be excused by the order of his superior."

The case of *People v. McLeod*,³³ recognized the principle that the command of, or the ratification of, an act by a foreign potentate does not excuse his soldier for obeying such command if his act would otherwise constitute a crime.

In *Comm. v. Blodgett*³⁴ it was held that soldiers cross-

³¹ See also, *U. S. v. Greiner*, 4 Phila. 396.

³² 3 Wash. C. C. 209, 1813.

³³ 1 Hill (N. Y.) 379, 1841; at p. 426.

³⁴ 12 Met. (Mass.) 56, 1846.

ing from Rhode Island to Massachusetts, to capture fugitives from the former state, were guilty of an unlawful act and that they could not justify under the commands of their superiors, because this was an act of war; and, if so, they could only be excused if Massachusetts might look to Rhode Island for redress, that is, if this act of war had been commanded by the supreme authorities of Rhode Island.

In *United States v. Carr*,³⁵ a soldier was shot as a result of a quarrel between several soldiers in a military post. There was some evidence that the victim was running away at the time the shot was fired, and that the prisoner was ordered to fire by the ranking sergeant. The court charged: "Nor will any order of a superior officer to an inferior in rank justify the willful killing of a person under the peace and protection of the law: A soldier is bound to obey only the lawful orders of his superiors. If he receives an order to do an unlawful act, he is bound neither by his duty nor his oath to do it. So far from such order being a justification, it makes the party giving the order an accomplice in the crime. For instance, an order from an officer to a soldier to shoot another for disrespectful words merely, would, if obeyed, be murder, both in the officer and soldier."³⁶

The last case bearing on the subject is *In re Fair*,³⁷ which, while not directly in point, quotes with approval the language quoted above from *McCall v. McDowell*, thus recognizing the rule that for the soldier to be liable his superior's order must be palpably illegal to a man in his station.³⁸

³⁵ 1 Woods, 480, 1872.

³⁶ See also, *Riggs, v. State*, 3 Cold. (Tenn.) 85; *U. S. v. Greiner*, 4 Phila. 396.

³⁷ 100 Fed. 149, 1900.

³⁸ In this case the defendants had been tried by a court martial for shooting an escaping prisoner. After acquittal they were arrested by the state authorities. They asked for their release on *habeas corpus*, because, if they were guilty of a crime triable by a civil court, such civil court must be a court of the United States and not a state court, since they were in the service of the United States. This was the main and vital point, and the discussion as to the justification of superior orders was really only *dictum*.

From these authorities it seems that some courts have made the soldier no exception to the rule that a man acts at his peril in the restraint of the liberties or the taking of the life of his fellows; that if he transgresses he must answer for his wrong, and that it is no better answer for him to give, than for a civil officer, that he acted under orders. Other cases seem to grant something to the necessities of discipline in an army, and to say that if the soldier, as a reasonable man, could not be expected to know the order was illegal, then the fact that he acted under that order ought to be a justification of his act.

Perhaps the latter is the fairer view. If it be so, what follows? That in the case under discussion the facts must be submitted to a jury, with an instruction that the orders were unnecessary and illegal, but that if they find that such illegality would not be patent to a man in defendant's position, and that defendant acted without malice in their execution, then they must acquit him. It is safe to trust to the judgment and good sense of American juries to give the defendant the most liberal treatment in such cases.

It may be said, then why have the rule if a jury is likely to acquit in this case? The answer is that the minute you make a rule of law that orders justify, you paralyze the arm of the civil law, and render it possible to cloak the vilest abuses of power under the pretence of a superior's commands. In such cases, again, the sense of a jury may be trusted to accomplish the conviction of him who falsely attempts to shield his own malicious motives behind the mask of military authority. Granting the most liberal construction given the rule by any of the cases, can the case ever be taken from the jury in a criminal trial? Must they not always, under appropriate instructions as to the legality of the orders, be asked with what intent the deed was done, and if they find no malice, then be required to say whether a reasonable man would under the circumstances have known the order to be either malicious or clearly illegal? To the writer it seems there can be but one answer. The jury must pass upon the case.

Owen J. Roberts.